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UNITED STATES OF AMERICA

KOMET, INC. and	)	UNITED STATES DISTRICT COURT
KONETEHIDAS OY KOMET,	)	DISTRICT OF NEW JERSEY
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 99-6080 (JWB)
	)	
REPUBLIC OF FINLAND and JOHN DOE,	)	
	)	Return date: September 24, 2001
Defendants.	)	

MEMORANDUM OF UNITED STATES OF AMERICA, AS *AMICUS CURIAE*,  
IN SUPPORT OF DEFENDANT'S MOTION TO VACATE DEFAULT JUDGMENT

ISSUE

Federal law gives foreign countries immunity from suit in U.S. courts, unless the country has waived its sovereign immunity. The U.S.-Finland Tax Treaty permits taxpayers in either country to present their international tax disputes through a process involving the countries' respective "competent authorities." But it does not waive either nation's immunity from suit in the courts of the other nation. Is the Republic of Finland immune from suit over Finnish taxes in the courts of the United States?

## INTRODUCTION–STATEMENT OF INTEREST

With the permission of the Court and the consent of the parties, the United States of America files this brief as a friend of the Court, in support of the motion filed by the Republic of Finland, to vacate the Judgment by Default entered in this case. Although this case involves a tax treaty between the United States and Finland, the Court's interpretation of that treaty could have implications far wider than just this case. The United States is a party to similar tax conventions with approximately 60 other nations. All of those treaties contain provisions for dispute resolution that substantially mirror the provisions of Article 25 of the U.S.-Finland Tax Convention. To deny the Motion to Vacate could expose other nations to suit over disputes concerning their domestic taxes in the courts of the United States. More significantly, it could also expose the United States to suit over U.S. taxes in the courts of other nations. Thus the United States has a significant and continuing interest in this case, and this Court's interpretation of Article 25 of the U.S.-Finland Treaty.

The United States and Finland have enjoyed a long and productive relationship throughout their history. One aspect of that relationship is embodied in the tax treaty into which both nations have entered, to advance their cooperation in the administration of their respective nation's tax laws. The United States writes to apprise the Court of its views on the application of the doctrine of sovereign immunity, and the role of the U.S.-Finland tax treaty, insofar as these issues bear on the Court's subject matter jurisdiction.

### PERTINENT FACTS<sup>1</sup>

The plaintiffs are a Finnish corporation and a United States corporation, both of which are principally owned by the same individual. Apparently the Finnish corporation believes it was subjected to Finnish corporate income taxes in an incorrect or illegal amount, for the years 1992-1999. In particular, the plaintiffs claim that the Finnish taxing authorities improperly refused to allow the Finnish corporation to deduct from its income certain payments it made to the U.S. corporation. The plaintiffs filed suit against the Republic of Finland in this Court, asking the Court to direct the Republic of Finland to refund Finnish corporate income taxes they claim to have overpaid. The Court's docket reflects the filing of a return of service upon the defendant.<sup>2</sup>

The Republic of Finland disputed the Court's jurisdiction. But instead of filing a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), personnel at the Embassy of Finland wrote letters to the Court, asserting the defense of sovereign immunity. Because the time to answer had expired, and the Republic of Finland had not answered or filed a motion under Rule 12, the plaintiff moved for entry of default judgment.

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<sup>1</sup>These facts are taken from the record in this case, including the Complaint, and are not reasonably in dispute.

<sup>2</sup>Although the docket does not reflect whether service was proper under Rule 4 and 28 U.S.C. §1608, the defendant has not contested the propriety of service.

When the defendant did not file an opposition, on July 2, 2001 the Court entered Judgment by Default against the Republic of Finland in the amount of \$146,769.50.

On August 30, 2001, the Republic of Finland timely moved to vacate the Judgment by Default, pursuant to Rule 60(b). It argues that it has not waived sovereign immunity, and is otherwise immune from suit, under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 -1611 (FSIA). The plaintiffs have filed an opposition, in which they argue only that Article 25 of the Tax Treaty between the United States and Finland waives sovereign immunity. The defendant has filed a timely reply, and the Court took the matter under submission without hearing, on September 24, 2001.

Because the parties have narrowed the issue to whether Article 25 of the Tax Treaty waives sovereign immunity under the FSIA, the United States will confine its brief to a discussion of that issue. For the reasons discussed below, Article 25 of the Finland-U.S. Tax Treaty does not waive the sovereign immunity of either nation to be sued by taxpayers in the courts of the other nation. Accordingly, the Court should vacate the Judgment of Default entered against the Republic of Finland. Ultimately, the Court should dismiss this case for lack of subject matter jurisdiction.

### ARGUMENT

#### The Treaty Does not Waive Either Nation's Sovereign Immunity from Suit in the Courts of the Other Nation

To have jurisdiction over the subject matter of this tax refund suit under the Foreign Sovereign Immunities Act (FSIA), the Court must find that the Republic of Finland expressly

or by implication waived its sovereign immunity from suit in the courts of the United States.<sup>3</sup>

If express, the Court must also find that that waiver was “clear, complete, unambiguous, and unmistakable.”<sup>4</sup> The United States agrees with the Republic of Finland, that it has not waived its immunity to be sued in United States courts for refunds of Finnish income taxes.

The courts construe narrowly the circumstances in which they will find an implicit waiver of sovereign immunity, limiting such waivers to circumstances that are “clearly unambiguous.”<sup>5</sup> That a nation signed a treaty with the United States, without more, does not implicitly waive sovereign immunity.<sup>6</sup> The plaintiffs do not claim that by signing the Treaty, Finland implicitly waived sovereign immunity under the FSIA.

The plaintiffs have raised only one argument in support of their position that Finland has waived its immunity. In particular, the plaintiffs quote selectively, and out of context, the provisions of Article 25 of the Tax Convention between the United States and Finland.<sup>7</sup> They argue that the following language in Article 25 explicitly waives sovereign immunity,

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<sup>3</sup>28 U.S.C. §1605(a)(1).

<sup>4</sup>See, Aguinda v. Texaco, Inc., 175 F.R.D. 50, 52 (S.D.N.Y. 1997) (and cases cited therein), vacated on other grounds sub nom., Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998).

<sup>5</sup>Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991).

<sup>6</sup>Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985).

<sup>7</sup>The full title of the treaty is “The Convention Between the Government of the United States of America and the Government of the Republic of Finland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital.” For simplicity’s sake, the United States refers to it as the “Treaty” or “Convention.”

and confers jurisdiction upon United States courts to hear disputes between Finland and taxpayers under the treaty:

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or national.

As discussed in the Republic of Finland's Reply Brief, and below, the plaintiffs misconstrue this language into something it is not. At the same time, the plaintiffs ask the Court to ignore the "competent authority" remedy which the Treaty provides in Article 25, and which is described in detail in Rev. Proc. 96-13, 1996-1 C.B. 616, a copy of which is attached for the Court's reference.

The Treaty defines "competent authority" as a term of art. Under the Treaty both Finland and the United States appoint persons to serve as their respective competent authorities, for purposes of fulfilling their obligations under the Treaty. Finland has appointed the Ministry of Finance or its authorized representative as the Finnish competent authority. The United States has appointed the Secretary of the Treasury or his delegate as the American competent authority.<sup>8</sup> Contrary to the plaintiff's argument, neither treaty partner has appointed its judicial branch or any particular court as "competent authority" in order to resolve disputes under Article 25 of the Treaty. Nor does anything in the plain language of Article 25 even remotely suggest that the treaty partners intended to subject

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<sup>8</sup>Since May 2001, the United States competent authority has been the Director, International (Large and Mid-Size Business), Internal Revenue Service. Before then, it was the Assistant Commissioner (International), Internal Revenue Service.

themselves to the other nation's court system in order to resolve tax disputes between the other nation and the other nation's taxpayers.

The Treaty clearly contemplates that taxpayers who believe they have been unjustly subjected to double taxation, contrary to the terms of the Treaty, will present their case to the "competent authority" of the nation where they reside or have their principal place of business. In the United States, the Internal Revenue Service has described that "competent authority" process in Rev. Proc. 96-13. Section 1 of that Rev. Proc. provides that the revenue procedure "sets forth the procedures concerning requests by taxpayers for assistance of the U.S. competent authority under the provisions of an income, estate, or gift tax treaty to which the United States is a party."

As the Court can see, the IRS has described in great detail the procedures which an aggrieved taxpayer must follow to obtain relief from the competent authority under a tax treaty such as the U.S.-Finland treaty now before the Court. Nowhere does that document permit the taxpayer to file suit against the foreign state, as a substitute for the procedure it describes. Nowhere does that document reference any treaty partner waiving sovereign immunity from suit under the FSIA. Section 12.05 provides that, if the competent authorities of the contracting states fail to agree, or if their agreement is not acceptable to the taxpayer, "the taxpayer may withdraw the request for competent authority assistance and **may then pursue all rights to review otherwise available under the laws of the United States** and the treaty country." (emphasis added). The plaintiffs can point to no law of the United States that gives it a right to judicial review of a decision of the Republic of Finland, either before or after the competent authorities have concluded their consideration

of a request for relief under Article 25 of the Treaty. Certainly, the Treaty itself does not waive Finland's sovereign immunity to permit such a lawsuit. In any event, the plaintiffs have utterly failed to use the process which both the Treaty and the IRS have provided to them. It is not up to this Court to create a process which circumvents the treaty and U.S. law.

The United States has entered into tax treaties with approximately 60 other nations, in which the treaty partners agreed to use this method for resolving disputes over double taxation. The United States is not aware of any case that has held that any similarly worded treaty provision waived sovereign immunity of a treaty partner to be sued in the courts of the other partner, or that conferred jurisdiction on the courts of the other nation.<sup>9</sup> To the contrary, at least one United States court has held that it lacked jurisdiction to compel the United States competent authority to reach any particular result, in considering

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<sup>9</sup>Indeed, U.S. courts have long held that they lack jurisdiction to enforce foreign tax judgments. United States v. Trapilo, 130 F.3d 547, 550 (2d Cir. 1997), cert. denied sub nom. Pierce v. United States, 525 U.S. 812 (1998); Her Majesty the Queen in Right of Province of British Columbia v. Gilbertson, 597 F.2d 1161, 1164 (9th Cir. 1979) (quoting Lord Mansfield's proclamation in Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (1775) that, "no country ever takes notice of the revenue laws of another.").



a tax dispute presented by an American subsidiary of a Japanese company under the U.S.-Japan Tax Convention.<sup>10</sup>

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<sup>10</sup>Yamaha Motor Corp, U.S.A. v. United States, 779 F.Supp. 610 (D.D.C. 1991).

## CONCLUSION

In summary, the Republic of Finland has not waived its sovereign immunity to permit taxpayers based in the United States to sue Finland in U.S. courts, seeking relief under Finnish tax law. To hold to the contrary would eviscerate the expectations and sovereignty not only of these treaty partners, but of most of the world's industrialized nations that have chosen to enter into similarly structured tax treaties with the United States. The Court should decline to do so, vacate the default judgment, and dismiss the case for lack of jurisdiction.

Dated:

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the foregoing MEMORANDUM OF UNITED STATES OF AMERICA, AS *AMICUS CURIAE*, IN SUPPORT OF DEFENDANT'S MOTION TO VACATE DEFAULT JUDGMENT, was served this \_\_\_\_ day of December, 2001, by sending copies to all counsel of record in this case by First Class Mail, postage prepaid, addressed as follows:

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